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Supreme Court of the United States

October Term, 1950.

No. 275

ARTHUR BROWN, suing in his own behalf and as stockholder of Eastern States Corporation, and in behalf of all other stockholders of said Corporation similarly situated,

Petitioner,

against

EASTERN STATES CORPORATION, a body corporate of the State of Maryland, and officers and directors: Floyd L. Carlisle, Jr., W. K. Dick, A. J. Eckert, R. K. Ferguson, R. B. Maltby, W. D. Moran, James W. Moss, Charles Plohn, Clifford Roberts, W. H. Versfelt, T. J. Walsh, and G. W. Wattles; and also Horace R. Lamb.

Reply Brief in Support of Petition for Certiorari.

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Reply Brief in Support of Petition for Certiorari.

The following is respectfully submitted in reply to various statements and contentions advanced by respondents in their brief in opposition to the petition for certiorari:

1.

The respondents argue as Point I of their brief that the case is moot because the time for tender of shares in exchange under the plan expired on September 30, 1949, by which time a certain number of exchanges (27% of the whole) had already taken place without possibility of more. In this contention, the respondents go squarely counter to the Circuit Court's own holding denying respondent's mo-

tion to dismiss the appeal as moot, the Court stating (Appendix B to Petition for Certiorari, p. 38):

> "We are not impressed by the argument that the case is rendered moot merely by reason of the fact that the exchanges have taken place."

That the case is not moot appears clearly, moreover, from the following considerations:

a. A "stock exchange" plan has been proceeded upon at least to partial execution and consummation by the respondent corporation and respondent directors. Evidently, the Circuit Court entertained the gravest doubt as to the legality and freedom from fraud of this plan under the applicable Maryland state law (Appendix B to Pet. for Cert., pp. 35-37). Because there has been this partial effectuation of the plan by exchanges already consummated does not mean, however, that the Courts are powerless to intervene and undo the injury caused by the illegal and fraudulent acts committed, ordering possible restitution and other relief. Courts of equity have precisely this power of restitution and redress, as the Circuit Court itself took pains to point out, viz (Appendix to Pet. for Cert., p. 39):

> "* * * we have no doubt of the power and duty of this court to afford him relief upon a finding that he was entitled to the injunction for which he had applied. Cf. *South Carolina Public Service Authority* v. *Securities and Exchange Commission*, 4 Cir. 170 F. 2d 948; *Chicago Junction Case*, 264 U. S. 258, 267."

b. One of the basic prayers for relief in both the original and amended complaint was for an accounting for waste of assets suffered or permitted to be suffered in connection with the plan.

It is clear that the plan, if illegal and fraudulent, as charged by petitioner and as clearly intimated by the Circuit Court, worked at the very least a waste of the assets of the corporation. It was such waste at least to the extent of the very substantial cost (considerably in excess of $50,000) of promulgating and putting the illegal plan into operation and effect, all for the personal benefit of the president of the corporation himself (Appendix B to Pet. for Cert., p. 36). It was also such waste to the extent that a full 27% of the block of St. Regis stock held by the respondent corporation was broken up and dissipated in the course of even the partial carrying out of the plan.

In these two basic respects, therefore, the case was as far as possible from being moot as claimed by respondents, and the Circuit Court properly so ruled, denying the respondents' motion to dismiss made on this very ground.

2.

The respondents state in their brief (p. 8):

> " * * * petitioner concedes, as is the fact, that at time of removal the suit was one arising under federal law of which the District Court clearly had valid jurisdiction (28 U. S. C. A. Sec. 1441)."

This is a clear misstatement, no doubt inadvertent, however, of petitioner's position. Quite the contrary, petitioner contends most forcibly that at time of removal the suit was *not* one arising under federal law of which the District Court had valid jurisdiction. Thus, the point heading of Point I of Petitioner's Brief in Support of Certiorari reads (p. 21):

> **"POINT I.**
>
> **"The original bill of complaint did not raise a substantial federal question. Hence, the original removal to the District Court was improper and not authorized by 28 U. S. C. Section 1441 (b), etc."**

3.

The respondents state as their Point III (p. 13):

> "The amended complaint did not eliminate the federal question."

This statement can best be refuted by reference to the amended complaint itself which was prepared and served, pursuant to leave granted by the Court, *precisely in order to eliminate every last, claimed vestige and trace of federal question from the case.* That the Circuit Court recognized the amended complaint as having that effect is clear from the Court's opinion, viz. (Appendix to Pet. for Cert., p. 32):

> "* * * The court (*i. e.*, District Court) declined to remand the case to the state court *after the complaint had been amended to eliminate all reference to rights under federal statutes, etc.*" (Emphasis and matter in parenthesis, ours.)

4.

The respondents state in their brief (pp. 10-12), that once the jurisdiction of the District Court has been properly acquired by removal, jurisdiction cannot be subsequently defeated in any way by amendment to plaintiff's pleadings. In support of this position, the respondents cite as supposedly applicable the familiar holdings that once a case has been properly removed the jurisdiction cannot be ousted by reducing *the amount in controversy* below the requisite amount and, similarly, that once a suit has been properly removed on the ground of diversity, jurisdiction cannot be defeated by *change of parties* as by substitution or intervention.

It is true the authorities hold to the foregoing effect in cases of (1) amount in controversy and (2) diversity. But side by side with these holdings in the cases referred to,

has always been the equally settled line of cases holding that amendment of a pleading to eliminate the federal question *does* oust the Court of its power to determine, at least in those cases where citizenship diversity is not left in the case as the basis on which to predicate the federal jurisdiction (see, cases cited in petitioner's main brief, pp. 25-26).

In this connection, and emphasizing the distinction in the two wholly separate lines of authority, we cannot do better than quote from the opinion of the Court in *Solanics* v. *Republic Steel Corporation,* 34 F. Supp. 951 (D. C. N. D. Ohio, E. D., Sept. 13, 1940), as follows:

> "It seems to this court that the language of the Supreme Court to the effect that federal jurisdiction will not be affected by amendment of pleadings after removal, must be restricted to the specific facts of the cases in which such language was used. If that is done, the pronouncement seems to apply and where the amendment reduces the amount prayed for (303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845) or where 'if it did not sufficiently appear at the time of the petition for removal that the cause was not separable, it did so appear when the second amended complaint was filed.' *Pullman Co. et al.* v. *Jenkins et al.,* 305 U. S. 534, 537, 59 S. Ct. 347, 349, 83 L. Ed. 334. In other words, it seems settled by the holdings of the Supreme Court that if a case has been properly removed, it will not be remanded merely because the plaintiff reduces the amount of his demand below the jurisdictional requirement, or because he changes the cause of his action to make it no longer separable as between defendants of diverse citizenship. *These are exceptions to the general rule, and the reasons for the exceptions are set forth in the cases referred to and the cases cited therein.*
>
> * * * * *

"The rule has been tersely stated thus: 'the potentiality of originality is a condition precedent to removability,' and with the exceptions as to change in amount or change in the separable nature of the controversy, the rule seems equally well settled that the case will be remanded or dismissed whenever the 'potentiality of originality' disappears.

* * * * *

"This court prefers the statement of the law by Judge Hand in *Fischer* v. *Star Co.*, D. C., 227 F. 955, and, for reasons pointed out above, does not feel that the decision in that case 'is contrary to controlling authorities in the Supreme Court.' If the language of the Supreme Court in the cases of *Pullman Co.* v. *Jenkins* and *St. Paul Indemnity Co.* v. *Cab Co., supra,* is limited to the facts it is not at variance with the interpretation of Section 37 of the Judicial Code (Tit. 28, Sec. 80 U. S. C., 28 U. S. C. A. §80) made by Judge Hand.

"The Supreme Court has repeatedly acknowledged the restricted jurisdiction of federal courts * * *. The Supreme Court in *St. Paul Indemnity Co.* v. *Cab Co., supra,* 303 U. S. page 288, 58 S. Ct. page 590, 82 L. Ed. 845 says: 'The principles governing dismissal of a cause initiated in the federal court or the remand of one begun in a state court have remained as they were before the section was adopted.'

"*And those principles required dismissal whenever want of basic jurisdiction appeared*" (citing many Supreme Court cases; all emphasis, ours).

What is here involved, therefore, is a basic and fundamental question of federal jurisdiction. Under the old Code, the *Solanics* decision undoubtedly reflected the true state of the law, a state of the law which on the facts at

bar would inevitably have required remand. In petitioner's main brief (pp. 26-27) it has been shown—and conclusively, we believe—that the new provisions of the Code were not intended to effect any change whatever in this regard.

It would serve little purpose to argue the question in this reply brief at length, other than as already presented in petitioner's main brief. Suffice it to say, precisely this is a novel and fundamental question of federal statutory and constitutional law, introduced by the new provisions of the Code and affecting the jurisdiction of the federal Courts, which has not been, but should be, settled by this Court.

The petition for certiorari should be granted.

Dated, New York, N. Y., September 27th, 1950.

Respectfully submitted,

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EDMUND B. HENNEFELD,
Of Counsel.